Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT

On Petition for a Writ of Certiorari to the Court of Appeals
for the Sixth Circuit
No. 05-2347

KYLE DRESBACH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the the mid trial production of significant exculpatory evidence by government witness Jerome Allen require that a new trial be granted, where the untimely production of the evidence violated Kyles v Whitley and Brady v Maryland?

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REFERENCE TO DECISIONS BELOW

The September 18, 2007 decision denying rehearing and rehearing en banc of the Sixth Circuit Court of Appeals is published as United States v Graham and Dresbach, 484 F3d 413 (6th Cir 2007), and that Court's opinion is dated April 20, 2007, affirming the district court for the Eastern District of Michigan's unpublished order denying the motions for new trial.

STATEMENT OF THE BASIS OF JURISDICTION

This is an appeal following a jury trial in the Eastern District of Michigan. The Sixth Circuit Court of Appeals affirmed the convictions and sentences in an opinion dated April 20, 2007 and, on September 18, 2007, denied a petition for rehearing and rehearing en banc.[1] The jurisdiction of this Court arises from 28 USC 1257.

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[1] This petition is one day late because counsel miscalculated the date on which it was due.

CONSTITUTIONAL PROVISIONS INVOLVED

US Const, Amend V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

US Const, Amend XIV:

...nor shall any State deprive any person of life, liberty, or property, without due process of law.

CONCISE STATEMENT OF THE CASE

Kyle Dresbach was charged in a Superceding Indictment, together with co-defendant Kenneth Graham, as follows: Count One: Conspiracy; Count Two: Conspiracy to Commit Money Laundering; Counts Three and Four: Money Laundering (Counts Five and Six charged this offense as to Mr. Graham); and Counts Nine and Ten: Subscribing to a False Tax Return (Counts Seven and Eight charged this offense against Mr. Graham).

The charges involved allegations that both defendants, while employed as executives at Thyssen, a steel company with offices in Detroit, were involved in a scheme in which certain Thyssen suppliers and a consultant, Robert Murdock of Hurricane Machine, overbilled the company. Murdock, in turn, paid seventy five or eighty percent of the overbilled money to an attorney for Thyssen, who was also the personal lawyer for the defendants. The lawyer, Jerome Jay Allen, in turn, claimed that he paid the shares of the defendants by paying their personal bills as they directed. Although Allen was charged, he had reached a cooperation deal with the government before the Indictment was filed,

and was the government's main witness.

The day after co-defendant Graham's testimony, the court denied a defense motion for mistrial because Allen found new boxes containing documents of legal representation of Graham, including promissory notes, although Allen had previously testified there were no promissory notes. The court told defense counsel to examine the boxes over the weekend. The following Monday, the court was informed that Allen had eighteen boxes and defense counsel had been unable to review them because the government insisted that Allen's lawyer inventory the boxes before they were turned over to defense counsel, and that task was impossible to perform over the weekend. The court denied motions to dismiss and for a mistrial without prejudice, and later denied the defendants' motions for new trial regarding Allen's failure to turn over the 18 boxes of documents produced in the midst of trial, ruling that nondisclosure should not be imputed to the government.

The Court of Appeals had jurisdiction for the appeal pursuant to 28 USC 1291. The panel affirmed the convictions and sentences, finding no Kyles or Brady violation because Allen was not a government agent and because the government's duty did not extend to the instant

evidence. Judge Batchelder dissented.

REASON FOR GRANTING THE WRIT

THE MID TRIAL PRODUCTION OF SIGNIFICANT EXCULPATORY EVIDENCE BY MR. ALLEN REQUIRES THAT A NEW TRIAL BE GRANTED WHERE THE UNTIMELY PRODUCTION OF THE EVIDENCE VIOLATED KYLES V WHITLEY AND BRADY V MARYLAND

Mid trial (after the government's case in chief was concluded and in the midst of the presentation of co-defendant Graham's defense), Allen "found" many boxes of documents which could have supported various aspects of the defense and which would have obviated the need for Graham's trial testimony. Graham argued, and the district court rejected, that a new trial should have been granted on these grounds; in support of this motion, Graham appended many exhibits which consisted of documents from the boxes. Dresbach joined in this motion, contending that his failure to testify was based on the searing cross examination of Graham by the government; in other words, had the government produced the boxes, Graham would not have testified and Dresbach would have. The defense strategy of both defendants was affected by the government's failure to produce the boxes.

In denying the motions, the district court and the Court of Appeals found that the government was not in possession of the disputed files. Relying on Kyles v Whitley, 514 US 419, 434 (1995), while acknowledging that no case extends, or declines to extend Kyles to the facts of the instant situation, the court found that the informant Allen's possession of the files should not be imputed to the government. Since the government did not suppress the files, the district court next found that Brady v Maryland, 373 US 83 (1963) was inapplicable.

This Court should grant this petition to determine the extent of both Brady and Kyles. This is a question which arises with some frequency as criminal defendants cooperate with the government in exchange for less severe sentences. The dearth of authority provides little guidance to the lower courts on this issue. Where a cooperating witness acts on behalf of the government, neither the witness nor the government should be permitted to hide behind the other.

CONCLUSION

Mr. Dresbach requests that this Court grant this petition fr a writ of certiorari.

Respectfully Submitted,

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DATED: December 18, 2007